91-340

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

KENNETH A. BELLOWS

PETITIONER,

v.

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, and NATIONAL TRANSPORTATION SAFETY BOARD,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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602/326-0283
COUNSEL FOR PETITIONER

AUGUST, 1991

QUESTIONS PRESENTED

1. Is it a violation of the Administrative Procedure Act (APA) for the Federal Aviation Administration (FAA) to interpret vague language about "public interest" in its charter to authorize it to order suspension of pilots' licenses as a penalty for violation of air-safety rules, when the statutory section relied upon says nothing of penalties or rules violations, yet fail either to publish its interpretation in the *Federal Register* or *Code of Federal Regulations,* or promulgate the policy through public notice and comment procedures?

2. Does the fact the pilot was subjected to the license-penalty policy years earlier constitute the "actual notice," as defined in the APA, that would bar using the FAA's failure to publish it as a defense to the later action, even though that failure was a clear violation of the APA?

* * * * *

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PETITION FOR A WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Kenneth A. Bellows respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in this proceeding March 29, 1991, order denying Rehearing entered May 29, 1991[1]

OPINIONS BELOW

The opinion of the District of Columbia Circuit is not reported; it is reprinted in the appendix.

The Opinion and Order of the National Transportation Safety Board (NTSB), not reported, is reprinted in the appendix; also the administrative law judge's (ALJ) decision it affirmed.

JURISDICTION

The Federal Aviation Administration

[1] Simultaneously filed with this case is Rochna v. National Transp. Safety Bd., 929 F.2d 13 (1st Cir. 1991). 1991). Except for a single additional (but different) issue injected by the appeals court in each, the basic APA issues raised by petitioners are identical.

(FAA) initiated an enforcement action against petitioner under 49 U.S.C. app. § 1429-(a) by serving him with a Notice of Proposed Certificate Action dated November 19, 1986, followed by an Order of Suspension dated May 12, 1987, which ordered a 45-day suspension of his Commercial Pilot Certificate (license) as punishment for alleged safety violations. Pursuant to section 1429(a), he appealed to the NTSB for a hearing de novo, which was held July 11, 1988 by the ALJ, who affirmed the suspension; the Board order, also affirming, was entered July 22, 1988.

Mr. Bellows petitioned the Court of Appeals for the District of Columbia Circuit for review under 49 U.S.C. § 1486. On March 29, 1991, the court entered judgment and *per curiam* opinion affirming the NTSB; order denying petition for rehearing was entered May 29, 1991.

Jurisdiction of this Court to review the

judgment of the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Statutes and regulations directly relevant to the issues (pertinent text in appendix) are:

Administrative Procedure Act, 5 U.S.C. §§ 551-559, 702-706 (1982): §§ 551(4), 552(a)(1), 553, 558, 706.

Federal Aviation Act of 1958, as amended, 49 U.S.C. app. §§ 1301-1552 (1982): §§ 1429(a) & 1471(a)(1).

Federal Aviation Regulations, 14 C.F.R. Parts 1-199 (1986): § 13.19.

STATEMENT OF THE CASE

This case is essentially a call for the Court to exercise its powers of supervision over the court below. Sup.Ct.R. 10.1(a). We urge it to grant certiorari and send the case back to the Court of Appeals, directing it to answer certain basic questions which, we are certain, should resolve the

case there.

Mr. Bellows, who operates an airtaxi service in Sitka, Alaska, was charged by the FAA with flying through clouds while carrying passengers on a Visual Flight Rules (VFR) flight. (No issue is raised concerning the rules alleged to have been violated.) The FAA ordered his license suspended for 45 days as a penalty. The only penalty ever mandated by Congress for airsafety violations is a civil fine.

The agency's claim of authority for license penalties, however, arises from a strained interpretation of language in the Federal Aviation Act of 1958 that connects suspension and revocation of various agency certificates with the words "public interest." The agency contends it may suspend or revoke anytime it deems it to be in the public interest and, ergo, punishing pilots for safety violations, obviously, is *in* the public interest.

On its face, this claim is a "statement of general policy," and "an interpretation of general applicability formulated and adopted by the agency." The Administrative Procedure Act (APA) requires both to be published in the *Federal Register*. Failure so to do is a bar to "adverse" action against the citizen. The FAA denies neither the characterizations nor its failure to publish.

The license-penalty policy has the substantial impact that requires it to be adopted through APA public notice and comment procedures, failure of which voids it. The FAA denies neither that it is "substantive," nor its failure to so adopt.

The District of Columbia Circuit injected the issue of "actual notice" of the policy, which precludes using the failure-to-publish defense, because Mr. Bellows years before was the subject of a similar action. This was a misapplication of that

exception.

REASONS FOR GRANTING THE WRIT

Exceptional importance In its 33 years the Federal Aviation Administration has suspended or revoked about 80,000 persons--pilots, mechanics and operators. Yet, as remarkable as it may seem, the agency has promulgated *no* rule, through public notice and comment, or otherwise, that pilot or mechanic can read in the *Code of Federal Regulations* which would warn him that one of the penalties for the violation of any safety rule is suspension or revocation of his FAA license. The agency has not even published in the *Federal Register* a policy statement to this effect. It never denies these stark facts, nor do appeals courts ever confront them. This is why this case presents a need for this Court to exercise its appellate supervisory powers.

In weighing the importance of petitioner's case, we ask the Court to compare the

basic APA issue he raises to the APA issue in a case for which it recently granted certiorari: *Air Transport Ass'n of America v. Dept. of Transp.*, 900 F.2d 369 (D.C. Cir.); *cert. granted*, 111 S.Ct. 669, 112 L.Ed.2d 662); *remanded*, to consider question of mootness, 111 S.Ct. 944, 112 L.Ed.2d 1033 (1991). The issues raised here, we submit, are vastly more important than those raised in *Air Transport*. There, under a Congressional mandate to create an in-house administrative hearing program for civil penalty cases not exceeding $50,000 (a kind of traffic or justice-of-the-peace court), the FAA published in the *Federal Register* and *Code of Federal Regulations* a voluminous and complex set of rules to implement it. The agency, however, deliberately failed to use APA public notice and comment procedures. The Air Transport Association, which represents major air carriers, along with others, challenged their

validity and was upheld. (The FAA then republished them using public notice and comment procedures. *See* 55 *Fed.Reg.* 27548 (1990)). The agency argued the rules were exempt from notice and comment requirements because under 5 U.S.C. § 553(b)(A) they were "rules of agency organization, procedure, or practice."

The perceived "harm" the government complained of was that agencies might in borderline cases have to bear the unnecessary burden of publishing a notice of their intention to adopt such rules, and allow public comment before so doing, or be uncertain whether they should. (Given the letter and spirit of the APA, it is anomalous that the government would contend that the public has no business participating in the creation of a scheme of *due process* procedures designed to implement an entire system of administrative justice.)

The official wrong that petitioner com-

plains of, for himself and the next 80,000 citizens subjected to FAA license penalties, is that in no official government publication is there any language that warns the citizen pilot he or she may be subjected to such a penalty for violating an airsafety rule. Like petitioner, two to three thousand persons every year have their licenses suspended or revoked, hundreds of professionals lose months of wages, often their right to earn a living.

A key element of this wrong is that it allows the agency to proceed *without ever having to make an official statement of whence comes its authority to impose such a penalty. See* 5 U.S.C. § 553(b)(2). It also deprives pilots of any opportunity as "interested persons" to indicate the criteria they think should be used to determine when a license penalty should be used in lieu of a money fine.

Counsel for petitioner and *Rochna*, the

companion case, has several times asked the Court to consider this extraordinary problem: e.g., see *Komjathy v. National Transp. Safety Bd.*, 832 F.2d 1294 (D.C. Cir.), *cert. denied*, 486 U.S. 1057, 108 S.Ct. 2825, 100 L.Ed.2d 926 (1988); *Tearney v. National Transp. Safety Bd.*, 868 F.2d 1451 (5th Cir.), *cert. denied*, 110 S.Ct. 333, 107 L.Ed.2d 322 (1989); *Go Air, Inc. v. National Transp. Safety Bd.*, slip op. (D.C. Cir., Mar. 7, 1988), *cert. denied*, 109 S.Ct. 223, 102 L.Ed.2d 214 (1988).[2]

All petitioner seeks is to require the FAA to comply with the Administrative Procedure Act. In considering the importance

[2] Because of these, the First Circuit in *Rochna* accused counsel for petitioner of being "oblivious to the obvious" and of "foolish persistency." *Rochna*, *supra*, 929 F.2d at 16. Counsel might otherwise be chagrined by such chastisement but for the fact he is author of the only extant indepth history of FAA enforcement. *See Smith*, **FAA PUNITIVE CERTIFICATE SANCTIONS: THE EMPEROR WEARS NO CLOTHES; OR, HOW DO YOU PUNISH A PROPELLER?**, 14 Transp. L.J. 59-100 (1985). Evidently the court did not read it.

of this issue, we ask the Court, as background, to look at these facts:

1) Neither through Congressional hearings, nor APA rulemaking procedures, in the sixty-five years since the Federal Government started regulating aviation, has the public ever participated in the creation of license penalties.[3]

2) The only times Congress has considered airsafety violation penalties (1926, 1938, 1958 and 1987) it has mandated that violators "shall be" subject to civil penalties.[4]

3) Until forced to by the *Air Transport* case, the FAA in three-plus decades had *never* used APA notice and comment proced-

[3] Creation of a "penalty" by any body other than Congress is unconstitutional, but we do not raise that issue here. *See* United States v. Eaton, 144 U.S. 677 (1892), and 5 U.S.C. § 558.

[4] *See* 49 U.S.C. § 1471(a)(1): "*Any* person who violates . . . *any* rule, regulation, or order . . . *shall be* subject to a civil penalty . . ." [Emphasis added] The FAA never explains this imperative.

ures to promulgate *any* enforcement rule.

I. License-penalty policy violates APA and bars the action.

A. Failure to publish interpretation of general applicability.

After reciting the alleged facts of the incident and regulations violated, the FAA Order provides:

> By reason of the foregoing [violations], the Administrator has determined that **safety in air commerce or air transportation and the public interest require** the suspension of your Commercial Pilot Certificate.
>
> NOW, THEREFORE, IT IS ORDERED, pursuant to the authority vested in the Administrator by **Section 609 of the Federal Aviation Act of 1958**, as amended, that:
>
> (1) Any pilot certificate now held by you, including Commercial Pilot Certificate No. 1688595, be and hereby is suspended. [Emphasis added]

Section 609(a), 49 U.S.C. app. 1429(a), however, says nothing of violations, rules or penalties; it speaks only of qualifications matters, reinspection of aircraft, reexamination of airmen.

FAA use of its claimed 609 powers invol-

ves a dichotomy: suspension for lack of qualifications; punishment for safety violations. Its enforcement manual:

> (3) Suspension action is warranted in situations where a certificate holder resists reexamination or reinspection under Section 609 of the Federal Aviation Act, or the reexamination or reinspection is not satisfactorily accomplished within a reasonable length of time (see Chapter 8).
>
> (4) Suspension may be used for punitive purposes where the nature of the violation warrants it . . .

Compliance and Enforcement Program, FAA Order 2150.3, ¶ 205.b., at page 15 (1980) (Reprinted Oct. 1983). An earlier manual:

> Although the reexamination of certificated airmen and reinspection of certified aircraft . . . do not involve enforcement in the strict sense of "punishment of offenses," they are considered in this handbook because the objective and the procedures are identical with those applicable to enforcement matters.

Compliance and Enforcement, FAA Order 80-30.7A, ¶ 200 (1970) (Consol. Reprint 1977).

As section 609 contains no language relevant to violations and penalties, the

claim the Administrator may use license penalties, on its face, is "an interpretation of general applicability formulated and adopted by the agency," as well, of course, a "statement of general policy." *See* 5 U.S.C. § 552(a)(1)(D). In fact, in *Rochna*, the FAA *specifically* admitted this: "[T]he FAA action in this case was predicated on its interpretation of its authority under §609(a) . . ." Brief for the Respondents at 27, *Rochna v. National Transp. Safety Bd.*, No. 90-1919, slip op. (1st Cir., Mar. 26, 1991) (emphasis added).

The APA requires that "Each agency . . . publish in the Federal Register for the guidance of the public -- . . . statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 552(a)(1)(D). And "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be

required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. . . ." *Id.*

In posing this issue, petitioner assumes, *arguendo*, the agency has lawful authority to adopt the policy.

Petitioner has established the two conditions needed to require dismissal of his case: (1) the policy used against him is an interpretation of general applicability formulated and adopted by the FAA; (2) by default, the FAA admits it has never been published. The only official place in which reference to the license-penalty policy may be found is an agency handbook. The Court has squarely held that placing such a policy in an agency manual does not comply with the APA; for it to be enforceable, publication requirements of the APA must be met. *Morton v. Ruiz*, 415 U.S. 199 (1974); *see also, Northern California Power Agency v.*

Morton, 396 F.Supp. 1187, 1191 (D.D.C. 1975), *affirmed* 539 F.2d 243 (D.C. Cir. 1976) ("The statute clearly provides that no administrative action taken pursuant to unpublished procedures can be allowed to stand against a person adversely affected thereby.").

B. Failure to promulgate through APA public notice and comment procedures

It is undisputed the FAA has no regulation that tells pilots their licenses may be suspended as a penalty for a safety violation. *See* 14 C.F.R. § 13.19. A pilot's license is a property right. *Pastrana v. United States*, 746 F.2d 1447 (11th Cir. 1984). Beyond argument, the license-penalty policy is a "rule" within the APA definition, 5 U.S.C. § 551(4), and a "substantive rule of general applicability" which must be "adopted as authorized by law." *See id.* §§ 552(a)(1)(D) and 553(d). Section 553, was meant to provide an opportunity for

public participation by "interested persons" in the rule making process when that process results in the promulgation of rules or regulations of substantial impact. *Pharmaceutical Mfrs. Assoc. v. Finch*, 307 F.Supp. 858 (D. Del. 1970).

"The purpose of requiring a statement of the basis and purpose is to enable courts, which have the duty to exercise review, to be aware of the legal and factual framework underlying the agency's action." *Am. Standard, Inc. v. U.S.*, 602 F.2d 256, 269 (U.S.Ct. of Claims 1979). How can the public and the courts know what the legal basis is for a penalty that deprives citizens of the right to earn a living unless the FAA promulgates the policy through public notice and comment? On what basis does the FAA substitute that penalty, in its sole discretion, for a money fine?

Law and precedent require that the safety-violation case against Mr. Bellows be

dismissed on two counts: failure to publish the section 609 interpretation; failure to promulgate the license-penalty policy thr-ough notice and comment. *See* 5 U.S.C. § 706.

II. Previous safety violation case not "actual notice" as defined in APA

Because petitioner years earlier was subjected to a license penalty, the appeals court ruled the event

> "constitutes actual notice of the NTSB [sic] rule. Consequently, even if section 552(a)(1)(D) were to require publication of the rule, petitioner could not challenge his suspension on that ground: once an individual has actual notice of an agency rule, he cannot complain that that rule was not published properly. *See id.*

Bellows, v. National Transp. Safety Bd., No. 90-1336, slip op. at 3 (D.C. Cir., Mar. 29, 1991). This holding is without merit, it strains the APA "actual notice" rule beyond reason. The FAA did not raise this issue; that silence speaks volumes. The District of Columbia Circuit neither pro-

vides analysis nor case precedent. How compare a *penalty* with one who sees a *No Trespassing* sign on military reservation fence, climbs it, then claims the sign invalid because the directive for it was not published? *See United States v. Mowat*, 582 F.2d 1194 (9th Cir. 1978). (What happened to Mr. Bellows right, as an "interested person," 5 U.S.C. § 553(c), to participate in making the very rule used to deprive him of his livelihood for 45 days?

III. Decision below flawed; case should be remanded with instructions

We urge the Court to remand this case to the District of Columbia Circuit because of the serious errors to be seen in its opinion. Two omissions are key to the court's reaching the wrong result: (1) it never recognized a punitive suspension for what it is, a *penalty*, which has to change the character of any argument about the APA; (2) it never recognized, or acknowledged

the dichotomy inherent in section 609--one use for suspensions and revocations, violation penalties, the other, for lack of qualifications, a dichotomy spelled out in the FAA's own enforcement manuals, *supra*.

How can Mr. Bellows be said to have received justice when the appeals court repeatedly and mistakenly refers in its opinion to the NTSB as the rulemaking agency? This is unprecedented; no court has ever, to our knowledge, done this. The FAA makes the rules, the Board's only function is to review certain of its orders. 49 U.S.C. § 1429(a).

The court addressed a non-issue (as occurred in *Rochna*, and for the same reasons). It asserts that petitioner challenged 14 C.F.R. § 13.19, on APA grounds. *Bellows v. National Transp. Safety Bd.*, *supra*, slip op. at 2 (a-30). This is utterly without foundation. The mistake occurs because the FAA wrote its brief as if to

imply that Mr. Bellows had done so, when he had not.[6] That rule has no relevance to any issue raised by petitioner.

The appeals court misstates the APA issue petitioner did raise. It claims he charged the NTSB (FAA) with "neglecting to publish its policy of suspending . . . for safety violations." *Id.* As seen, this is not the complaint, it is the failure to publish its ***interpretation*** of section 609 to allow the agency to order license penalties.

The questions We urge the Court to remand this case to the District of Columbia Circuit, and instruct it to answer these questions:

[6] In a footnote the court states: "Section 13.19 allows the NTSB [sic] to suspend or revoke a certificate when 'public interest and safety in air commerce requires it.'" *Bellows v. National Tranp. Safety Bd.*, *supra*, slip op. at 3 n.*. It is axiomatic that rules do not confer authority, only the agency's basic charter can do that, otherwise an agency could lift itself up by its own bootstraps. They are an expression of what an agency claims it is authorized to do by that charter.

1) Is the suspension by the FAA of a pilot's certificate for the violation of a safety regulation, when his qualifications are not at issue, a "penalty," as that term is commonly used?

2) Is such a penalty used by the FAA as an alternative penalty to that of a civil-money fine?

3) Is the FAA's claim of authority for punitive certificate suspensions based on an interpretation of the public interest language contained in section 609 of the Federal Aviation Act of 1958?

4) If so, and the interpretation has never been published in the *Federal Register*, on what basis would that not be a violation of 5 U.S.C. § 552(a)(1)?

5) Is the license-penalty policy "substantive" as the term is defined in the Administrative Procedure Act and, if so, and it has never been adopted through public notice and comment, on what basis would

that not be a violation of 5 U.S.C. § 553?

6) In what official United States Government publication may a member of the public find a statement that a pilot is subject to losing his license for the violation of a safety rule?

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

Lawrence B. Smith
Attorney for Petitioner

August 1991

APPENDIX

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[p. 1]

U.S. Department of Transportation
Federal Aviation Administration
Alaskan Region
701 C Street, Box 14
Anchorage, Alaska 99513

Case No. 86AL620038

May 12, 1987

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Kenneth A. Bellows
P.O. Box 204
Sitka, Alaska 99835

ORDER OF SUSPENSION

You were advised by mail through a Notice of Proposed Certificate Action dated November 19, 1986, of the circumstances and reasons why we proposed to suspend your Commercial Pilot Certificate No. 1688595.

After considering all the evidence presently a part of this proceeding, including the information presented by you during a telephonic informal conference held on May 5, 1987, the Administrator of the Federal Aviation Administration, acting by and through his Regional Counsel, has deter-

mined that:

1. You are now, and at all time hereinafter mentioned were, the holder of Commercial Pilot Certificate No. 1988595.

2. On or about July 5, 1986, you, as pilot-in-command, operated civil aircraft N64398, a DeHavilland Model DHC-2, on a VFR passenger-carrying flight being operated by BellAir, Inc., for compensation or hire, subject to the requirements of Part 135 of the Federal Aviation Regulations, originating at Sitka, Alaska, with destinations of Port Alexander, Alaska, and Port Armstrong, Alaska.

3. Following your departure from Sitka, you operated N64398 into and through a cloud cover in your route of flight destinations on top of the cloud cover.

[p. 2] 4. By operating N64398 in the manner and under the circumstances set forth above, you operated an aircraft in a careless

manner so as to endanger the life or property of another.

5. By Order of Suspension dated September 4, 1980, issued by the Administrator of the Federal Aviation Administration, and subsequently affirmed by the National Transportation Safety Board and the U.S. Court of Appeals for the Ninth Circuit, your Commercial Pilot Certificate was suspended for a period of ten (10) days for violations of Sections 91.9 and 91.79(c) of the Federal Aviation Regulations.

Based on the foregoing, you violated the following Federal Aviation Regulations:

(a) Section 91.105(a), in that you operated an aircraft under VFR when the flight visibility was less, or at a distance from the clouds that was less, than that prescribed for basic VFR weather conditions.

(b) Section 91.9, in that you operated

an aircraft in a careless manner so as to endanger the life or property of another.

By reason of the foregoing, the Administrator has determined that safety in air commerce or air transportation and the public interest require the suspension of your Commercial Pilot Certificate.

NOW, THEREFORE, IT IS ORDERED, pursuant to the authority vested in the Administrator by Section 609 of the Federal Aviation Act of 1958, as amended, that:

(1) Any pilot certificate now held by you, including Commercial Pilot Certificate No. 1688595, be and hereby is suspended.

(2) Said suspension shall become effective twenty (20) days after the date of service of this Order, or on the date of actual surrender of your certificate, if earlier, and shall continue in effect until the certificate has been suspended for a period of forty-five (45) days.

(3) Said certificate be surrendered by mail in the enclosed self-addressed, postage-paid envelope, or delivery to the Regional Counsel of the Federal Aviation Administration, 701 C Street, Box 14, Anchorage, Alaska 99513-0087, on or before the effective date of this Order.

(4) If you fail to surrender your certificate on or before the effective date of this Order, said suspension shall continue in effect until forty-five (45) days subsequent to the actual date of surrender thereof to the Federal Aviation Administration.

(5) No application for a new pilot certificate shall be accepted from you, nor shall any certificate be issued to you, during the period of suspension imposed by this Order.

DONALD H. BOBERICK
Regional Counsel

By: /s/
Leland S. Edwards, Jr.
Associate Regional Counsel

APPEAL

You may appeal this Order within twenty (20) days from the time of its service upon you to the National Transportation Safety Board, Office of Administrative Law Judges, 800 Independence Avenue, SW., Washington, D.C. 20594. Please refer to your individual case number on all correspondence. You are required to furnish a copy of your Notice of Appeal to this office. In the event of an appeal of this Order, Part 821 of the National Transportation Safety Board Proceedings will be applicable to and govern the proceedings, and a copy of this Order will be filed with the Board and constitute the Administrator's Complaint. Such appeal will stay the effectiveness of this Order.

[p. 1] SERVED: July 22, 1988

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES
(303) 361-0615

T. ALLAN MCARTOR, Administrator, Federal Aviation Administration,	*	
Complainant,	*	
v.	*	Docket SE-8333
KENNETH A. BELLOWS,	*	
Respondent.	*	

For Complainant: Delinda L. Wall, Esq.

For Respondent: John L. Geitz

Before: Patrick G. Geraghty
Administrative Law Judge

DECISION AND ORDER

Pursuant to Notice, this matter was called for trial on July 11, 1988, in Sitka, Alaska, on the Appeal of Kenneth A. Bellows, hereafter Respondent, for review of Complainant's Order which sought to suspend Respondent's Commercial Pilot Certificate for a period of forty-five (45)

days.

Because of administrative difficulties, the Court Reporter failed to appear. The Parties agreed, however, to proceed despite the absence of a reporter and formal record, relying on this Judge's summary of the evidence and his written notes of the proceeding. At the conclusion of the session an Oral decision

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[p. 2] and Order was stated, affirming the Complaint. This written Decision and Order, as agreed to by the Parties, is a restatement of the Oral Decision made for purpose of record.

AGREEMENTS

By Pleading it was agreed that the allegations stated in Paragraphs 1, 2 and 5 of the Complaint are not in dispute. Those facts are, accordingly, taken as established for purposes of deciding this pro-

ceeding.

DISCUSSION

Complainant called three (3) witnesses in support of his Complaint, the first of whom was Matthew Kirchhoff. This witness is not a pilot, but in the course of his employment has flown 200 to 300 hours in light aircraft. On the date in question he and his family, his wife and two (2) small children, were passengers in the aircraft operated by Respondent.

Prior to departing Sitka on the date of the flight he had observed the weather in the vicinity of Sitka Airport to be a solid overcast at about 1000 feet above ground level (AGL). On departure this witness was seated in the rearmost seat. His wife and two children were in the center seats and a fourth passenger was in the right front seat.

[p. 3] According to Mr. Kirchoff, after takeoff, the aircraft climbed steadily for about five (5) minutes and deliberately entered the overcast, which was stated as extending solidly to the west and east. The aircraft, on his testimony, continued in the clouds for about two (2) minutes. The witness stated that he could see out the side window next to him and observed that visibility was obscured by thick clouds. He stated that he could also see out the other windows of the aircraft -- though he could best observe out the side windows -- and that to his view the aircraft was totally in the clouds. The witness testified that, after being in the clouds for the period stated, the aircraft came out on top and proceeded over the top of the undercast to its destination. He stated, while not positive of the aircraft position, that, by observing mountain peaks that showed above

the undercast and from direction of take-off, he could place the approximate flight path, which he drew on Exhibit C-1, a sectional chart of the area.

Mrs. Patricia Kirchoff was seated on the center seat bench, with her two (2) children, one on either side. She stated that she could lean over her child and see clearly out either of the two (2) side windows and that she also could see out through the front windshield. She also observed the weather prior to takeoff, stating that it appeared as a solid overcast without any breaks.

[p. 4] After takeoff she was pointing out things to her children through the side windows when she realized that the aircraft had entered the cloud cover. She stated that she became concerned to the point of tapping Respondent's shoulder and asking

why the aircraft was flying in the clouds. According to her, Respondent simply replied not to worry as they would be out (of the clouds) in a few seconds. The witness stated that she then purposely looked out both side windows and down and confirmed that the aircraft was totally inside the cloud formation, with visibility limited to about the wing tips.

Robert Kolvig is employed by the Federal Aviation Administration (FAA) as an Operations Inspector. His testimony was offered to support Exhibit C-2 which is a written statement submitted to the FAA by the passenger who occupied the right front seat, i.e., J.A. Smattan.

Mr. Smattan's statement is corroborated by the testimony of Mr. & Mrs. Kirchhoff and thus I consider the statement as reliable and probative. The statement indicates that Mr. Smattan, from his position in the

right front seat, also observed Respondent to operate the aircraft "through the clouds" and that the cloud cover "was thick with only the mountain tops showing."

Respondent did not testify on his own behalf and called just one (1) witness, Mr. Ronald Resman.

[p. 5] Mr. Resman is employed by Alaska Airlines as a pilot holding a Captain's position. He has many flight hours in the type of aircraft being operated by Respondent at the time of this incident, i.e., a DeHavilland DHC-2 "Beaver." He stated that in this type aircraft, because of body attitude in flight, passengers seated in the rear can only see out through the upper portion of the front window and that this factor could result in the passengers thinking the aircraft was in clouds, if a cloud was ahead of the aircraft. He conceded,

however, that rear passengers would have no difficulty seeing out the aircraft's side windows.

Respondent also offered Exhibit R-1, copies of the Surface Weather Observations made at Sitka Airport on the date in question. The Exhibit was received in evidence and is part of the record.

Respondent is charged with operating in violation of Sections 91.105(a) and 91.9 Federal Aviation Regulations (FARs).1/ Section 91.105(a) specifies prescribed visibility and distance from clouds for aircraft being operated under Visual Flight Rules. (VFR). The testimony of Mr. Kirchhoff and the

1/ See Attachment -- Photocopy Excerpt from 14 CFR 91.105.

[p. 6] flight path as drawn on Exhibit C-1, establishes that the flight took place in uncontrolled airspace. Accordingly, the

flight visibility and distance from cloud requirements to be met were: at 1200 feet or less AGL, 1 statute mile and clear of clouds; more than 1200 feet AGL but less than 10,000 MSL (mean sea level), 1 statute mile, 1000 feet above, 500 feet under and 2000 feet horizontally from clouds.

The weight of the probative and reliable evidence clearly shows that Respondent deliberately operated his aircraft into and penetrated a solid cloud overcast. The testimony of Mr. & Mrs. Kirchhoff is not directly challenged by anything offered by Respondent. Further, their version of the events is also borne out by the written statement of the third adult passenger, Mr. Smattan. Mr. Resman's testimony in no way can be said to dispute the observations made by Mr. & Mrs. Kirchoff out of the aircraft's side windows, and of course, is inapplicable to the observations made by

Mr. Smatten from the right front passenger seat. The Exhibit R-1 gives surface weather observations made at Sitka Airport and show the existence of overcast conditions which is generally supportive of the testimony of Complainant's witness. Reports of breaks in the overcast are not specific as to location and cannot be reasonably related to the point five (5) or more minutes into the flight away from Sitka Airport. I

[p. 7] conclude and find, therefore, that Respondent did deliberately operate his aircraft into the then existing overcast, thereby, operating in less than the prescribed visibility and at less then the distance from clouds specified in Section 91.105(a), regardless of whether the operation into the overcast occurred below or above 1200 feet AGL.

Section 91.9 prohibits careless operation which endangers life or property of

others. Board precedent establishes that potential endangerment from flight operation is sufficient to sustain a finding of violation of this Section. Obviously the operation performed by Respondent was at least potentially hazardous as other aircraft could have been operating in the overcast or immediately above it. I find, therefore, that the evidence establishes Respondent operated in regulatory violation of Section 91.9 FAR. And I so hold.

Respondent concedes to his prior FAR violation record and it is to be taken into account in assessing the penalty imposed herein. Respondent has offered nothing that would warrant reduction of the suspension sought by Complainant. I find, therefore, that safety in air transportation, air commerce and the public interest requires affirmation of the Order of Suspension/Complaint, particularly where one

considers that the operation was being conducted under Part 135 FAR and thus

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[p. 8] requires a high degree of care and judgment on the part of Respondent. He failed to exhibit such in the conduct of this flight.

ORDER

IT IS THEREFORE ORDERED THAT:

(1) The Complaint/Order of Suspension be, and it hereby is, affirmed as issued.

(2) Respondent's Pilot Certificate be, and it hereby is,, suspended for a period of forty-five (45) days, effective ten (10) days from the date of this Order.

(3) Respondent must physically surrender the Certificate either by personal delivery or by mailing, postage prepaid, to the Complainant or his authorized agent. If the Certificate is surrendered on or before the effective date of this Order, the suspension will commence as of that date; however, if not surrendered on or before the effective date, the period of suspension shall continue in force and effect until the Certificate has been physically surrendered to and has been in the possession of the Complainant/Administrator for the period ordered herein.

Entered the 11th day of July 1988, at Sitka, Alaska.

/s/

Patrick G. Geraghty
Judge

Attachment [Not reproduced, see 14 CFR § 91.105 (1986)]

SERVED: May 30, 1990
NTSB Order No. EA-3133

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the
NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 27th day of April, 1990

JAMES B. BUSEY, Administrator, Federal Aviation Administration, Complainant, v. KENNETH A. BELLOWS, Respondent.	Docket SE-8333

OPINION AND ORDER

The respondent has appealed from the initial decision of Administrative Law Judge Patrick G. Geraghty issued on July 22, 1988, following an evidentiary hearing held on July 11. 1/ By that decision the law judge affirmed an order of the Administrator suspending respondent's

1/ A copy of the law judge's decision is attached.

[p. 2] commercial pilot certificate for 45 days for his alleged violations of section 91.105(a) and 91.9 of the Federal Aviation Regulations ("FAR," 14 CFR Part 91). 2/ For the reasons that follow respondent's appeal will be denied.

The Administrator's order of suspension, which served as the complaint herein, alleged among other things, the following conduct by respondent:

> "2. On or about July 5, 1986, you, as pilot-in-command, operated civil aircraft N64398, a DeHavilland Model DHC-2, on a VFR passenger-carrying flight being operated by BellAir, Inc., for compensation or hire, subject to the requirements of Part 135 of the Federal Aviation Regulations, originating at Sitka, Alaska, with destinations of Port Alexander, Alaska, and Port Armstrong, Alaska.

3. Following your departure from Sitka, you operated N64398 into and through a cloud cover in your route of flight and thereafter continued en route toward your destinations on top of the cloud cover."

2/ A copy of section 91.105(a) is attached to the initial decision.

Section 91.9 provides as follows:

"§91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

[p. 3] The Administrator's case, for the most part, was presented through the live testimony of two of the passengers on the flight and the written statement of another passenger, all of whom gave testimony directly supporting the charge that respondent had flown through a cloud layer. Respondent did not testify in his own behalf and the testimony of the one non-passenger witness he did call, while conceding full side window visibility, did little more

than establish that rear seat passengers in a DHC-2 Model aircraft have limited visibility through the front window.

Most of Respondent's argument on appeal derive from the circumstance that no verbatim transcript of the hearing was made because no reporter showed up to transcribe the proceeding. Respondent contends that absent a transcript he can not effectively pursue his right of appeal to the Board from the law judge's decision. We agree that the lack of a transcript severely restricts the scope of objections that might otherwise have been available. However, as discussed below, the issue here is not whether having no transcript adversely affects a party's right to appeal, but, rather, whether a party should be permitted to renounce an agreement to go forward with a hearing he knew at the outset would not be recorded. As to that issue, our answer is no.

[p. 4] The record does not disclose why no court reporter was available at the time and place set for respondent's hearing. The law judge's decision unequivocally states, nevertheless, that the "Parties agree... to proceed despite the absence of a reporter and formal record, relying on this judge's summary of the evidence and his written notes of the proceeding." 3/ Although respondent does not argue that the law judge has misstated the parties' agreement in this connection, he contends, by counsel, for a variety of reasons that the agreement should be deemed invalid or void. 4/ We find no merit in any of them. 5/

3/ While a law judge has no authority to hold a hearing without permitting a formal record to be made, we see no reason why a law judge should not be free to accede to a consensual request of the parties to that end. At the same time, we think it well within a law judge's authority to deny such a request.

4/ We do not read the law judge's statement of the parties' agreement to have

required him to provide them with a copy of his notes of the testimony. Rather, he appears to have intended to indicate that the parties had agreed to rely on the law judge's summary of the evidence which would itself be based on his written notes. In any event, it does not appear that respondent ever requested a copy of those notes, and the remote possibility that the law judges' summary may not reflect all of the evidence in his notes has no bearing, in our judgment, on the validity of the agreement the parties reached with each other.

5/ Absent some significant dispute concerning the law judge's account of the issue, we would find his statement in the initial decision of the parties' agreement concerning the matter to be adequate compliance with the requirement of our regulations that waivers be in writing or by stipulation entered into the record. See 49 CFR §821.13. By statute, the initial decision is "part of the record...." See 5 U.S.C. §557(c).

[p. 5] In our judgment, it should be self-evident to a party, including one not represented by legal counsel, 6/ that foregoing a transcript of an adjudicatory hearing would narrow the scope of objections that could be effectively pressed, if available at all, in the event of an appeal. 7/ Nevertheless, we do not think that the

possibility that respondent may not have been fully aware of the consequences for his right to appeal an adverse decision to the Board undermines the validity of his agreement to dispense with a transcript. We think it neither necessary nor appropriate, in the context of the certificate actions we are authorized to review, to undertake to determine whether, or to require a showing establishing, that the decision of a respondent to give up some right or benefit rested on an adequate understanding of all the likely ramifications. Rather, we believe it consistent with the nature of our administrative adjudications to presume that a respondent, including one who decides not to secure professional legal assistance, is both competent to make judgments affecting the course of his appeal and prepared to accept the consequences

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6/ Respondent appears to have been represented by counsel at the time of his hearing but his attorney did not attend the

hearing. Rather, an aviation consultant attended the hearing as respondent's representative.

7/ The failure to provide record citations for alleged errors based on the evidence of record may be treated by the Board as a waiver of any objection based thereon. See 49 CFR section 821.48(c).

[p. 6] of choices that may subsequently turn out to have been ill-advised or uninformed. 8/ This case presents no occasion to alter our views in this regard.

Respondent's remaining contentions involve matters that either will not be considered because they cannot be resolved in the absence of a transcript the parties agreed to wave or legal arguments thoroughly refuted in the Administrator's reply brief. They warrant no comment here.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied,

2. The Administrator's order of suspension and the law judge's "Decision and Order" are affirmed, and

3. The 45 day suspension of respondent's airman certificate shall commence 30 days after service of this opinion and order. 9/

KOLSTAD, Chairman, COUGHLIN, Acting Vice Chairman, LAUBER and BURNETT, Members of the Board, concurred in the above opinion and order.

8/ We think, for example, that while many pro se respondents are successful in defending against certificate actions, a respondent who represents himself more likely than not compromises his chances of presenting as effective a defense as might otherwise be advanced if he were not pro se. Notwithstanding that view, given the administrative, non-criminal nature of these proceedings, a respondent may represent himself without satisfying us that the decision not to obtain counsel was a knowing informed one.

9/For purpose of this opinion and order, the respondent must physically surrender his certificate to an appropriate representative of the Administrator, pursuant to FAR section 61.19(f).

[p. 1]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1990

[Filed: March 29, 1991]

No. 90-1336

Kenneth A. Bellows,

Petitioner

v.

National Transportation Safety Board and James B. Busey, Administrator, Federal Aviation Administration,

Respondents

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL TRANSPORTATION SAFETY BOARD

BEFORE: Silberman, Buckley and Henderson Circuit Judges

JUDGMENT

This case was considered on the record from the National Transportation Safety Board and on the briefs filed by the parties. The court has determined that the issues presented occasion no need for a published opinion. *See* D.C. Cir. Rule 14-(c). For the reasons set forth in the accompanying memorandum, it is

ORDERED and ADJUDGED by the court that petitioner's petition for review be and hereby is denied.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. R. 15(b)-(2).

Per Curiam
For the Court

/s/
Constance L. Dupre
Clerk

[p. 2] MEMORANDUM

Petitioner Bellows raises three arguments before this court: (i) that the National Transportation Safety Board (NTSB) failed to comply with section 553 of the Administrative Procedure Act (APA), 5 U.S.C. § 553, by neglecting to promulgate 14 C.F.R. § 13.19, which authorizes the NTSB to suspend pilots' licenses for safety violations, through notice and comment rulemaking; (ii) that the NTSB failed to comply with section 552(a)(1)(D) of the APA, 5 U.S.C. § 552(a)(1)(D), by neglecting to publish its policy of suspending or

revoking pilots' licenses for safety violations; and (iii) that petitioner's due process rights were violated because the proceedings before the administrative law judge (ALJ) were not formally recorded.

The first of these claims raises an issue that this court has squarely addressed and dismissed. In *Komjathy v. NTSB*, 832 F.2d 1294, 1296-97 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1057 (1988), we held that 14 C.F.R. § 13.19 was not required to be promulgated according to notice and comment rulemaking. Also we noted that even were such rulemaking required, the NTSB had complied with that requirement in 1962. *Id.* at 1297 n.1 (citing *Go Leasing, Inc. v. NTSB*, 800 F.2d 1514, 1522 (9th Cir. 1986). In light of *Komjathy*, we conclude that petitioner's claim that the NTSB rule does not comply with section 553 of the APA must be dismissed.

The second claim raised by petitioner, like the first, raises no significant issue. Section 552(a)(1)(D) of the APA requires

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[p. 3] publication of "substantive rules of general applicability . . . and statements of general policy or interpretations of general applicability." Bellows argues that 14 C.F.R. § 13.19 does not give adequate notice of the NTSB's authority to revoke or suspend certificates for violating safety rules.* Consequently Bellows would have us conclude that section 552(a)(1)(D) of the APA requires publication of the NTSB's specific policy regarding suspension and revocation of certificates. We reject this expansive interpretation of section 552. Because the NTSB's suspension and revocation policy "is not a statement of general policy but, rather, is an expression of a

specific application of the policy announced" in section 13.19, separate publication is not necessary. *Tearney v. NTSB*, 868 F.2d 1451, 1454 (5th Cir.), *cert. denied*, 110 S.Ct. 333 (1989). Also we note that petitioner's license had been suspended by the NTSB once before and that earlier suspension constitutes actual notice of the NTSB rule. Consequently, even if section 552(a)-(1)(D) were to require publication of the rule, petitioner could not challenge his suspension on that ground: once an individual has actual notice of an agency rule, he cannot complain that that rule was not published properly. *See id.*

Finally, petitioner's last claim must fail because he waived his right to have the proceedings before the ALJ officially recorded. There is no evidence whatsoever that would indicate that

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*Section 13.19 allows the NTSB to sus-

pend or revoke a certificate when "public interest and safety in air commerce requires it."

[p. 4] petitioner's waiver was not knowing or intelligent. Instead petitioner merely argues that no layman could have understood the implications of a waiver and therefore it would be unfair to find a waiver. Because petitioner participated in a previous certificate suspension action, which he litigated all the way to the appellate level, we conclude that he was familiar with Board proceedings and that his waiver was knowing.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1990

[Filed: May 29, 1991]

No. 90-1336

KENNETH A. BELLOWS
Petitioner,

v.

NATIONAL TRANSPORTATION SAFETY BOARD
AND JAMES B. BUSEY, ADMINISTRATOR, FEDERAL
AVIATION ADMINISTRATION,
Respondents.

BEFORE:

Silberman, Buckley and Henderson
Circuit Judges

O R D E R

Upon consideration of petitioner's petition for rehearing, filed May 8, 1991, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

/s/
BY: Robert A. Bonner
Deputy Clerk

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5 U.S.C. § 551(4) (1982)

For the purpose of this subchapter --

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include --

* * * *

(4) "rule" means the whole or a part of

an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

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5 U.S.C. § 552(a)(1) (1982)

Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public --

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formu-

lated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms there of, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

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5 U.S.C. § 553 (1982)

Rule making

(a) This section applies, according to the provisions thereof, except to the ex-

tent that there is involved --

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include --

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is re-

quired by statute, this subsection does not apply --

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When

rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except --

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

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5 U.S.C. § 558 (1982)

Imposition of sanctions; determination of

applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

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5 U.S.C. § 706 (1982)

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall --

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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49 U.S.C. app. § 1429(a) (1982)

Reinspection or reexamination; amendment, suspension, or revocation of certification

(a) procedure; notification; hearing; appeal to National Transportation Safety Board; judicial review

The Secretary of Transportation [Administrator] may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Secretary of Transportation [Administrator], he determines that safety in air commerce or air transportation and

the public interest requires, the Secretary of Transportation [Administrator] may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate (including airport operating certificate), or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Secretary of Transportation [Administrator] shall advise the holder thereof as to any charges or other reasons relied upon by the Secretary of Transportation [Administrator] for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified,

suspended, or revoked. Any person whose certificate is affected by such an order of the Secretary of Transportation [Administrator] under this section may appeal the Secretary of Transportation's [Administrator's] order to the National Transportation Safety Board and the National Transportation Safety Board may, after notice and hearing, amend, modify, or reverse the Secretary of Transportation's [Administrator's] order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Secretary of Transportation's [Administrator's] order. In the conduct of its hearings the National Transportation Safety Board shall not be bound by findings of fact of the Secretary of Transportation [Administrator]. The filing of an appeal with the National Transportation Safety Board shall stay the effective-

ness of the Secretary of Transportation's [Administrator's] order unless the Secretary of Transportation [Administrator] advises the National Transportation Safety Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the National Transportation Safety Board shall finally dispose of the appeal within sixty days after being so advised by the Secretary of Transportation [Administrator]. The person substantially affected by the National Transportation Safety Board's order may obtain judicial review of said order under the provisions of section 1486 of this Appendix, and the Secretary of Transportation [Administrator] shall be made a party to such proceedings.

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49 U.S.C. app. § 1471 (1982)

Civil penalties; notice and hearing; compromise; liens

(a)(1) Any person who violates (A) any provision of subchapter III, IV, V, VI, VII, or XII of this chapter * * * or any rule, regulation, or order issued thereunder, * * * shall be subject to a civil penalty of not to exceed $1,000 for each such violation, * * * If such violation is a continuing one, each day of such violation shall constitute a separate offense. * * *

(2) Any civil penalty may be compromised by the Secretary of Transportation [Administrator] in the case of violations of subchapters III, V, VI, or XII of this chapter, or any rule, regulation, or order issued thereunder, * * *

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14 C.F.R. § 13.19 (1986)

Certificate action.

(a) Under section 609 of the Federal Aviation Act of 1958 (49 U.S.C. 1429), the Administrator may reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, and may re-examine any civil airman. Under section 501(e) of the FA Act, any Certificate of Aircraft Registration may be suspended or revoked by the Administrator for any cause that renders the aircraft ineligible for registration.

(b) If, as a result of such a reinspection, re-examination, or other investigation made by the Administrator under section 609 of the FA Act, the Administrator determines that the public interest and safety in air commerce requires it, the Administrator may issue an order amending, suspending, or revoking, all or part of any type certificate, production certificate, airworthiness certificate, airman certifi-

cate, air carrier operating certificate, air navigation facility certificate, or air agency certificate. This authority may be exercised for remedial purposes in cases involving the Hazardous Materials Transportation Act (49 U.S.C. 1801 et seq.) or regulations issued under that Act. This authority is also exercised by the Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, and the Regional Counsel concerned. If the Administrator finds that any aircraft registered under Part 47 of this chapter is ineligible for registration or if the holder of a Certificate of Aircraft Registration has refused or failed to submit AC Form 8050-73, as required by § 47.51 of this chapter, the Administrator issues an order suspending or revoking that certificate. This authority as to aircraft found ineligible for registration is also exercised

by the Aeronautical Center Counsel.

(c) Before issuing an order under paragraph (b) of this section, the Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, the Regional Counsel concerned, or the Aeronautical Center Counsel (as to matters under Title V of the FA Act) advises the certificate holder of the charges or other reasons upon which the Administrator bases the proposed action and, except in an emergency, allows the holder to answer any charges and to be heard as to why the certificate should not be amended, suspended, or revoked. The holder may, by checking the appropriate box on the form that is sent to the holder with the notice of proposed certificate action, elect to --

(1) Admit the charges and surrender his or her certificate;

(2) Answer the charges in writing;

(3) Request that an order be issued in accordance with the notice of proposed certificate action so that the certificate holder may appeal to the National Transportation Safety Board, if the charges concerning a matter under Title VI of the FA Act;

(4) Request an opportunity to be heard in an informal conference with the FAA counsel; or

(5) Request a hearing in accordance with Subpart D of this part if the charges concern a matter under Title V of the FA Act. Except as provided in § 13.35(b), unless the certificate holder returns the form and, where required, an answer or motion, with a postmark of not later than 15 days after the date of receipt of the notice, the order of the Administrator is issued as proposed. If the certificate holder has requested an informal conference with the

FAA counsel and the charges concern a matter under Title V of the FA Act, the holder may after that conference also request a formal hearing in writing with a postmark of not later than 10 days after the close of the conference. After considering any information submitted by the certificate holder, the Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, the Regional Counsel concerned, or the Aeronautical Center Counsel (as to matters under Title V of the FA Act) issues the order of the Administrator, except that if the holder has made a valid request for a formal hearing on a matter under Title V of the FA Act initially or after an informal conference, Subpart D of this part governs further proceedings.

(d) Any person whose certificate is affected by an order issued under this section may appeal to the National Trans-

portation Safety Board. If the certificate holder files an appeal with the Board, the Administrator's order is stayed unless the Administrator advises the Board that an emergency exists and safety in air commerce requires that the order become effective immediately. If the Board is so advised, the order remains effective and the Board shall finally dispose of the appeal within 60 days after the date of the advice. This paragraph does not apply to any person whose Certificate of Aircraft Registration is affected by an order issued under this section.